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# Ruminations of Res Judicata

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# RUMINATIONS ON RES JUDICATA

*by*

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## I. GENERAL HISTORICAL BACKGROUND OF RES JUDICATA

> The doctrine of *res adjudicata* [*sic*] is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings either before same or any other tribunal.[1]

This characterization of res judicata,[2] as a simple, easily applied legal doctrine, may have been valid at one time; however, such a reputation was short-lived. Disparate interpretation of the doctrine by courts and scholars alike has transformed res judicata into a legal labyrinth.

The basic precept that an official determination upon a disputed fact or state of facts should be regarded as final and conclusive between the parties is a rule common to virtually every system of jurisprudence.[3] Roman law provided for an *exceptio rei judicatae* or plea of former judgment;[4] the plea was available only when a subsequent controversy involved the same parties and same point of law.[5] This concept became a part of the jurisprudence of England and was the forerunner of our res judicata principles of merger and bar.[6]

A second branch of the doctrine, collateral estoppel, is the progeny of medieval Germanic law.[7] This concept was based upon the principle that determinations made in a prior suit were conclusive in a subsequent suit founded upon a *wholly different* cause of action. The conclusive effect of the first suit was based upon the statements of the party; thus, the parties were estopped to assert the same facts in the second suit.[8]

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1. Foster v. The Richard Busteed, 100 Mass. 409, 412 (1868); 2 H. BLACK, JUDGMENTS § 504 (2d ed. 1902) [hereinafter cited as BLACK].

2. Literally, "res judicata" means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." BLACK'S LAW DICTIONARY 1470 (rev. 4th ed. 1968).

3. 2 BLACK § 500.

4. *Id.* § 501.

5. *Id.*; *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952) [hereinafter cited as *Developments in the Law*].

6. *Developments in the Law* 820.

7. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 44 (1940).

8. *Developments in the Law* 820. A final judgment was required to make this "estoppel by record" conclusive, even though the statements of the party, not the judgment, estopped the party. The necessity of offering a final judgment in the subsequent suit resulted in the inaccurate description of collateral estoppel as "estoppel by judgment." 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 147-54 (3d ed. 1944); *Developments in the Law* 821.

These two principles, merger/bar and collateral estoppel, are collectively known as res judicata. Although the two wholly different concepts are sometimes confused, courts have sought to establish and maintain the distinction. As early as 1876 the United States Supreme Court, in *Cromwell v. County of Sac*,[9] clearly distinguished between the effect of a prior judgment (as a bar) in a subsequent suit involving the same cause of action, and its effect (as an estoppel) in a later suit involving a different claim or cause of action. The Court in *Cromwell* stated:

> In the former case, the judgment . . . constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . .
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.[10]

Texas courts also recognized the distinction at an early date and in 1900, the Texas Supreme Court adopted the language of *Cromwell v. County of Sac* in the case of *Hanrick v. Gurley*.[11]

The dichotomy in the principle of res judicata is now well recognized. Where the same cause of action is involved in a subsequent suit, the plaintiff's cause of action in the first suit is *merged* into a final judgment (*i.e.*, the cause of action dissolves) when the plaintiff prevails;[12] if the defendant wins the first suit, the plaintiff is *barred* from bringing another action.[13] The scope of merger/bar is not limited to matters actually litigated; the judgment in the first suit precludes a second action not only on matters actually litigated, but also on matters which might have been litigated in the first suit.[14] Merger and bar, also called "claim preclusion"[15] or "technical"[16] res judicata, have been codified in the *Restatement*,[17] and there is little conceptual difficulty in grasping the definition of the principles. The difficulty arises when one attempts to apply the principles or to determine precisely what constitutes a "cause of action" or "matters which might have been litigated."

Collateral estoppel, which is also referred to as "issue preclusion,"[18] applies to a subsequent suit involving a *different* cause of action. When the

9. 94 U.S. 351 (1876).
10. *Id.* at 352-53.
11. 93 Tex. 458, 56 S.W. 330 (1900). *See also* Permian Oil Co. v. Smith, 129 Tex. 413, 107 S.W.2d 564 (1937).
12. RESTATEMENT OF JUDGMENTS § 47 (1942) [hereinafter cited as RESTATEMENT].
13. *Id.* § 48.
14. Cromwell v. County of Sac, 94 U.S. 351 (1876); Hanrick v. Gurley, 93 Tex. 458, 56 S.W. 330 (1900).
15. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968).
16. 103 U. PA. L. REV. 273, 274 (1954).
17. RESTATEMENT §§ 47, 48.
18. Vestal, *supra* note 15, at 1723.

same issues or questions of fact arise in a subsequent suit, the first judgment is conclusive as to those matters actually litigated and determined in the former action.[19] Thus, the party is "estopped" to relitigate or challenge those facts or issues in the second suit.

In modern usage, the generic term "res judicata" is often used in reference to the principles of merger/bar and collateral estoppel either collectively or individually. The two principles are based upon identical policy considerations, and there is an understandable overlap in the development of the doctrines.[20] In addition, there is often confusion between res judicata (generically speaking) and other legal doctrines which affect a party's rights in subsequent litigation.

## II. OTHER DOCTRINES DISTINGUISHED

The doctrines of law of the case, stare decisis, and election of remedies are easily confused with res judicata. Each of these doctrines bears some resemblance to res judicata; further, these doctrines are founded upon many of the same policy considerations[21] as res judicata.

Law of the case is a rule establishing that an appellate court will not reconsider its former adjudication of a question of law, raised on subsequent appeal in the same case.[22] The doctrine relates only to questions of law and is strictly confined to subsequent stages in the same case.[23] Law of the case is easily distinguished from res judicata, as the latter doctrine is generally concerned with the effect of a former judgment on a subsequent and wholly independent proceeding.[24]

Stare decisis[25] is a fundamental principle of the common law. Under this doctrine, after a rule or proposition of law has been established by the Supreme Court or highest court in a state, such decision is generally accepted as binding precedent in the same or lower ranking courts when the same point is presented in a subsequent suit between different parties.[26] Stare decisis is high authority, but it is not absolutely binding; thus courts may reconsider, modify or reverse former pronouncements of the law.[27] Res ju-

19. RESTATEMENT § 68.

20. The primary inquiry in this Article is a determination of what constitutes a "cause of action" for the purposes of merger and bar. While some of the discussion is relevant to the subject of collateral estoppel, further development of that principle is beyond the scope of this Article. For a comprehensive discussion of collateral estoppel, see McGlinchey, *Collateral Estoppel in Texas*, 4 HOUS. L. REV. 73 (1966); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942); Vestal, *supra* note 15; *Developments in the Law*.

21. *See* notes 34-43 *infra*, and accompanying text.

22. However, courts are not absolutely bound by their decisions on the prior appeal and may permit a different holding if presented with exceptional circumstances. Bomar v. Parker, 68 Tex. 435, 4 S.W. 599 (1887). This principle also stands for the proposition that when an appellate court remands a case to a lower court for further proceedings, that lower court must follow the rulings of the appellate court. Lone Star Gas Co. v. State, 137 Tex. 279, 296, 153 S.W.2d 681, 691 (1941).

23. 2 A. FREEMAN, JUDGMENTS § 630 (5th ed. 1925) [hereinafter cited as FREEMAN].

24. *Id.*

25. The term means literally "[t]o abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1577 (rev. 4th ed. 1968).

26. Swilley v. McCain, 374 S.W.2d 871, 875 (Tex. 1964); 2 FREEMAN § 631.

27. von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929).

dicata does not enjoy the flexibility of stare decisis; once properly invoked, res judicata is binding upon both the court and the litigants.[28] Stare decisis involves only questions of law and applies only to the legal principles in a case, while res judicata is concerned with the judgment and its effect on the same parties in a subsequent proceeding.

An election of remedies exists when a party chooses between two or more inconsistent remedies actually existing at the time that the election is made.[29] When a party elects to pursue one of these remedies and fails, he is precluded from pursuing the remaining remedy.[30] For example, where one holds a voidable contract and may rescind, or may affirm the contract and sue for an amount under it, a suit on the contract constitutes an election and is thus a waiver of the right to rescind.[31] However, if the party misconceives his right, or improperly attempts to pursue a right which is not actually available and thus is defeated as a result of such error, his action does not constitute a conclusive election and does not preclude his pursuing an action based upon an inconsistent remedial right.[32] Election of remedies is founded upon estoppel principles and arises from action of the party, not of the court; if the first remedy is pursued to judgment, res judicata would attach and also preclude the second action.[33]

## III. POLICY CONSIDERATIONS

> A judgment is a bar, not because a party has done some act which precludes him from asserting a right or title; it is properly a bar on principles of public policy, because the peace and order of society, the structure of our judicial system, and the principles of our government require that a matter once litigated should not be again drawn in question between the same parties or their privies.[34]

It is this strong public policy which makes res judicata a fundamental concept in most systems of jurisprudence.[35] Authorities have enunciated several policy factors which justify the application of res judicata. A review of these considerations is appropriate, because these several factors constitute an important element in the practical application of the various conceptual models of cause of action.[36]

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28. *Id.*
29. White v. Bell, 290 S.W. 849, 851 (Tex. Civ. App.—Waco 1927), *error ref.*
30. Whitney v. Parish of Vernon, 154 S.W. 264 (Tex. Civ. App.—Galveston 1913), *error ref.*
31. *Id.* at 267.
32. White v. Bell, 290 S.W. 849, 851 (Tex. Civ. App.—Waco 1927), *error ref.*
33. *Developments in the Law* 823. It is possible that both res judicata and election of remedies would apply to the same case; thus, a prior suit on one theory, pursued to final judgment, not only would constitute an election of remedies but also would be res judicata on a second suit based upon a remedy previously available. 2 FREEMAN § 631.

The doctrine of preclusion of inconsistent positions is closely related to election of remedies; the latter generally applies to a choice between available theories, while the former precludes the assertion of factually contradictory statements. *Developments in the Law* 823-24. On the other hand, some may consider the doctrine of preclusion of inconsistent positions as incorporating both of these notions under the same heading. 2 FREEMAN § 631.
34. 2 FREEMAN § 626.
35. 2 BLACK § 500.
36. *See* text accompanying notes 44-67 *infra.*

*Freedom from Vexatious Litigation.* "A man should not be twice vexed for the same cause."[37] In reality, all litigation would appear to vex a defendant, and res judicata is one method available to minimize the inconvenience and annoyance of multiple lawsuits. When a party invokes the machinery of the judicial system against another party, he should resolve all related matters in controversy in that proceeding. Thus, failure or neglect in asserting a claim is no excuse, and a party should not be allowed to further harass the same defendant with related matters already resolved, or which could have been resolved in the prior action.[38]

*Danger of Double Recovery.* The desire to prevent a double recovery by any party is a fundamental reason for the doctrine of res judicata. If a party prevails in his first action against a defendant, the availability of a second proceeding on the same matter necessarily makes a duplicate or overlapping recovery possible. It seems most improbable that any court would consciously allow a double recovery on the same cause of action; however, a court's application of what appears to be a logical concept of cause of action in one situation might well serve as a precedent for a double recovery in other situations.[39]

*Desirability of Stable Decisions.* The relative stability of a court's decision affects individuals and society alike. An individual should be able to rely upon the judgment rendered by a court; if subsequent litigation is allowed on the same matter, unjust economic hardship to the individual might result. Multiple proceedings on the same cause of action and the resulting instability would endanger the marketability of property and clog the already overburdened judicial system. Further, such instability could not only engender in the public a contemptuous attitude toward the judicial system, but it would also allow a previously unsuccessful litigant to disregard the court's final judgment.[40]

*Economy of Court Time.* A final rationale for the doctrine of res judicata is judicial efficiency. In light of the growing problems in judicial administration, the amount of court time saved by operation of the doctrine should overcome any possible misfortune to the party precluded from asserting a claim in a subsequent action. In times past, a party might well assert each common law action evolving from the same transaction in an individual suit. Res judicata, in tandem with modern trial procedure, now minimizes the inconvenience, unnecessary repetition, and waste of time resulting from such a practice.[41]

37. 2 FREEMAN § 626.

38. Benson v. Wanda Petroleum, 468 S.W.2d 361, 363 (Tex. 1971); *see* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 346 (1948); Note, *Problems of Res Judicata Created by Expanding "Cause of Action" Under Code Pleading*, 104 U. PA. L. REV. 955, 962 (1956).

39. *See* Cleary, *supra* note 38, at 344-45.

40. *See id.* at 345-46; *Developments in the Law* 827-28.

41. *See Developments in the Law* 826-27. On the other hand, it has been argued that a savings in court time is not a valid justification for application of res judicata. The fact that the defense of res judicata may be waived belies the claim that the doctrine is an important time saver. If judges and courts are unable to meet the demands

*Policies Militating Against Res Judicata.* Although res judicata is a principle deeply rooted in our jurisprudence and well justified by public policy, there are certain considerations which do not favor the operation of the doctrine. When a party is limited to one proceeding, where two might have been available absent res judicata, he may be unfairly limited in the amount he is able to recover. Thus, where there is difficulty in adequately measuring damages due to events subsequent to the trial, a party's legitimate claim may be cut short by res judicata.

Further, there are some situations where multiple suits may be preferable to a single cause of action. For example, should a creditor be forced to sue simultaneously on all existing past due notes of the same debtor when each has been executed individually? If the assignor of a claim has recovered part of that claim on his own behalf, should res judicata preclude an assignee from then asserting his remaining individual claim against the defendant? Finally, the penalties of res judicata appear too harsh in some situations; through application of a highly conceptualized doctrine and innocent failure to assert a claim, one may be forever precluded from asserting his claim, no matter how legitimate or substantial it may be.[42] According to one writer, in certain situations the operation of res judicata is much like one old vaudeville skit: Two men owned a cow. One killed his half, and the other half died.[43]

## IV. CONCEPTUAL THEORIES OF CAUSE OF ACTION

Leading cases on res judicata,[44] the *Restatement of Judgments*,[45] and other recognized authorities[46] all explain the merger and bar concept of res judicata in similar language.[47] These authorities speak of the effect of prior judgments in barring or precluding the prosecution of a second action based upon the same cause of action; further, the prior judgment is said to bar not only matters actually litigated, but also matters which might have been litigated in the first suit. It is the frequent use of these two phrases, "cause

of the system, why not expand the system rather than apply such doctrines? Cleary, *supra* note 38, at 348-49.

42. *See Developments in the Law* 828-30; Note, *supra* note 38, at 970-72.

43. Cleary, *supra* note 38, at 346.

44. Cromwell v. County of Sac, 94 U.S. 351 (1876); Hanrick v. Gurley, 93 Tex. 458, 56 S.W. 330 (1900); Foster v. Wells, 4 Tex. 101 (1849).

45. RESTATEMENT §§ 47, 48.

46. 2 BLACK § 504; 2 FREEMAN § 626.

47. Under traditional analysis, a prior judgment operates as a bar under the doctrine of res judicata when there exists a concurrence of four conditions or identities: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; (4) identity of the quality in the persons for or against whom the claim is made. Philipowski v. Spencer, 63 Tex. 604, 606-07 (1885). The "four identities" approach is still a valid method of determining whether the bar or merger principle of res judicata should operate to preclude a second action. Most authorities deal with bar and merger, at least to some degree, in terms of these identities. 46 AM. JUR. 2D *Judgments* §§ 404-14 (1969); 50 C.J.S. *Judgments* §§ 648-85 (1947); 2 FREEMAN §§ 670-708; 34 TEX. JUR. 2D *Judgments* §§ 492-504 (1962). The discussion of merger and bar herein, which deals both with conceptual theories and with application of the principles in Texas law, is intentionally limited to analysis of only one of these identities, identity of the cause of action. The other identities are not without problems; however, cause of action seems to be one of the most important identities and certainly the most troublesome in terms of practical application.

of action" and "matters which might have been litigated," which results in the complexity and ambiguity in the law of merger and bar. As one scholar stated:

> [When we deal] with what might have been litigated in the former action, however, we leave the workaday world and enter into a wondrous realm of words, where results are obtained not by grubbing out facts but by the application of incantations which change pumpkins into coaches and one man's property into another's. The incantations are the various definitions of what constitutes a cause of action.[48]

The conceptual models which follow are indicative of the numerous efforts to comprehend and define these "incantations" murmured by courts and scholars.[49]

*Individualized/Same Evidence Concept.* Under this concept, a particular set of facts which is sufficient to individualize a specific rule of law (and thus distinguish it from any other claim against the same party) constitutes a single cause of action. Thus, even a minimal alteration of material facts may constitute a new cause of action, if the alteration makes available a new rule of substantive law.[50]

This concept, also described as the *same evidence* test, has been described as the "best and most invariable test"[51] for determining what constitutes a cause of action. Under the *same evidence* test, there is but one cause of action when the same evidence will support both the first and second action.[52]

The definition of cause of action advocated long ago by Professor McCaskill also falls within the *individualized* concept area. McCaskill defined a cause of action as follows: "It is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded."[53]

This concept may appear in several guises; whether it is articulated in terms of the *individualized* concept, the *same evidence* test or the group of operative facts definition, the impact of this concept is manifest. This "small-sized" cause of action generally restricts the operation of res judicata;[54] much like the ancient common law forms of action, this concept strictly limits an action according to the rights enforced under it.[55] While

48. Cleary, *supra* note 38, at 343.

49. In the examination of different concepts of cause of action, the authorities and proponents of each are noted where applicable. However, the general classification scheme is found in Schopflocher, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 21 ORE. L. REV. 319 (1942) [hereinafter cited as Schopflocher].

50. *Id.* at 323.

51. 2 FREEMAN § 687.

52. RESTATEMENT § 61; 2 FREEMAN § 687. *But see* RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 1, 1973), in which the "same evidence" test is abandoned.

53. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 638 (1925).

54. Cleary, *supra* note 38, at 340.

55. Keeton, *Action, Cause of Action, and Theory of the Action in Texas*, 11 TEXAS L. REV. 145, 146 (1933).

acclaimed as a simple and consistent criterion for defining cause of action,[56] this concept has also been criticized as being too narrow for practical application and oblivious to important policy considerations.[57]

*Pragmatic Concept.* A second concept, strongly advocated by Judge Charles E. Clark, among others, defines a cause of action as:

> such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right (if it is ever possible to isolate one such right from others). The extent of the cause is to be determined pragmatically by the court, having in mind the facts and circumstances of the particular case. Such extent may be settled by past precedents; but the controlling factor will be the matter of trial convenience, for that is the general purpose to be subserved by these procedural rules.[58]

The primary criterion of this concept is a determination of whether the additional facts supplied in the second action are so closely related to the fact situation of the prior action as to justify consideration of the two situations as one operative unit.[59] Thus, the court is not simply to inquire whether the added facts establish a different rule of law in the second action (as in the *individualized* concept); on the contrary, the court should consider practicalities, such as trial convenience and common usage, in deciding whether the first and second actions constitute one unified cause of action.[60]

The *pragmatic* concept, as the name implies, is considered a more practical approach. Indeed, if a layman were asked to define cause of action in this context, he would probably articulate a definition resembling the *pragmatic* concept.[61] However, this concept is not without criticism. While operation of this concept does include consideration of the facts in each action, reliance upon policy factors necessarily results in a more abstract prin-

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56. 2 FREEMAN § 687.

57. *Developments in the Law* 825; Schopflocher 364; *see* text accompanying notes 34-43 *supra* for discussion of policy considerations.

58. C. CLARK, CODE PLEADING 137 (2d ed. 1947).

59. Schopflocher 323-24.

60. *Id.* There are two additional definitions, both of which are hybrid forms of other concepts, which are best categorized under the *pragmatic* heading.

Pomeroy's definition of cause of action falls somewhere between the *individualized* and *pragmatic* concepts. Pomeroy breaks down the judicial action into several elements: a primary right in the plaintiff, a corresponding duty devolving on the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict; and finally the remedy or relief itself. As relevant here, Pomeroy advocates that the combination of facts showing a primary right and duty, and the delict or wrong constitutes a cause of action. J. POMEROY, CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS §§ 346-47 (5th ed. 1929); Keeton, *supra* note 55, at 147.

A second hybrid, the *ad hoc policy determination*, is a combination of the *pragmatic* and *broad procedural duty* concepts (discussed at notes 63-67 *infra* and accompanying text). While most courts at least pay lip service to some definitional approach, the ad hoc policy determination concept simply stands for a case by case analysis of relevant policy considerations. According to the individual circumstances of each situation, the court balances policy factors, discussed at notes 34-43 *supra*, and accompanying text, and then decides whether to permit or prohibit prosecution of the second suit.

61. "This means that a lay or nonlegal grouping of the facts into a single unit, as nonprofessional witnesses would naturally do, will be the most practicable." C. CLARK, *supra* note 58, at 137. *See also* Keeton, *supra* note 55, at 147.

ciple which is inherently unpredictable. Application of the concept must necessarily depend on judicial discretion; thus, it affords little basis for consistency and formulation of precedent.[62]

*Broad Procedural Duty Concept.* This concept contemplates that a party should be required to join all claims in one action; the joinder should include as many claims as possible under laws of procedure and principles of fairness, notwithstanding the fact that the same, or perhaps two or more causes of action are involved. This joinder assumes a close relationship between the causes of action.[63] In effect, the *broad procedural duty* concept is merely a strict application of the principle that one is barred from relitigating both matters actually litigated and matters which might have been litigated.[64]

This concept recognizes that a liberal or permissive attitude on joinder translates into a very strict operation of res judicata; thus, "permission to unite different causes of action in one complaint becomes a command."[65] The concept is similar to the *pragmatic* concept in several respects; the closer the fact situations in each proceeding, the more likely a party will be precluded from prosecuting the second action.[66] However, the preclusion from asserting a second action is based upon a procedural duty to join actions, not upon the doctrine of res judicata. For this reason, the court could consider the equities of the situation, such as determining whether the party has neglected a procedural duty, before imposing the procedural penalty.[67] The procedural concept does offer a wholly different basis for its application; however, the use of judicial discretion in determining observance of procedural duty necessarily subjects the concept to those criticisms levelled against the *pragmatic* concept.

## V. DEVELOPMENT OF BAR, MERGER, AND THE CAUSE OF ACTION IN TEXAS

Res judicata is firmly embedded in Texas law and as early as 1849 the Texas Supreme Court recognized a former judgment as a bar in a subsequent proceeding.[68] In another leading case[69] the dichotomy between the doctrines of bar/merger and collateral estoppel was established. From these early cases to the present, Texas courts have rendered numerous interpretations of bar and merger. While these cases have dealt with various aspects of the doctrine, the discussion which follows focuses upon the most fundamental, yet most perplexing element of bar and merger, the determination of what constitutes a cause of action. Rather than embark upon an exhaus-

62. Keeton, *supra* note 55, at 160; Schopflocher 324, 363; *Developments in the Law* 825.
63. Schopflocher 324.
64. Cromwell v. County of Sac, 94 U.S. 351 (1876); Hanrick v. Gurley, 93 Tex. 458, 56 S.W. 330 (1900).
65. Schopflocher 324.
66. *Id.*
67. *Id.*
68. Foster v. Wells, 4 Tex. 101 (1849).
69. Hanrick v. Gurley, 93 Tex. 458, 56 S.W. 330 (1900).

tive review of the many Texas cases which attempt to define a cause of action, the discussion is confined to an eclectic group of cases. Through analysis and classification of each case into one of the conceptual models (*individualized, pragmatic,* and *broad procedural duty*), the discussion traces the background and current status of the cause of action and explores the trends likely to govern the treatment of the concept by Texas courts.[70]

The case of *Freeman v. McAninch*[71] serves as a touchstone for modern interpretation of the cause of action in res judicata. In *Freeman* a prior trespass to try title suit concerning 622½ acres of land had resulted in a judgment for plaintiff Freeman. In the subsequent suit one of the former defendants asserted title to 134⅓ acres of land, all of which was embraced in the prior judgment. By way of defense, Freeman claimed that the prior judgment was a bar to the second action. However, the plaintiff in the second suit countered by attempting to prove that the prior litigation actually concerned only a boundary dispute, not a question of title to the property, while the second suit was based solely on the issue of title. The Texas Supreme Court determined that the former judgment was a bar because each suit involved the fundamental issue of title to the same land.

The plaintiff in *Freeman* was attempting to further refine the classic and most narrow concept of cause of action, the *individualized* concept. There is, at best, only a subtle distinction between a title suit which turns upon a boundary dispute and a "pure" title suit concerning the very same land. The same evidence was material to each suit, and the primary issue came under the same rule of substantive law.

While the court in *Freeman* was faced with a situation which demanded operation of the bar principle even under the narrow *individualized* concept, the court offered additional discussion concerning when a prior judgment should constitute a bar. The court stated: "A party cannot relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties, or their privies, in reference to the same subject-matter."[72] It was this reference to claims concerning the same "subject matter," coupled with an admonition to use "diligence" and "care" in asserting all existing claims, which would lead to a broader reading of the opinion in later years.[73]

70. For a prior interpretation of the cause of action in several contexts, including res judicata, see Keeton, *supra* note 55.

71. 87 Tex. 132, 27 S.W. 97 (1894).

72. *Id.* at 139, 27 S.W. at 100.

73. The *Freeman* rationale was expressly followed 43 years later in Permian Oil Co. v. Smith, 129 Tex. 413, 107 S.W.2d 564 (1937). In *Permian Oil Co.* the majority (in an opinion by Special Associate Justice Fouts) determined that although a prior trespass to try title action was principally a boundary dispute, it was nevertheless a bar under res judicata on a subsequent action for determination of title. Although the case did involve collateral problems, the principal issue was identical to the question in *Freeman*, and *Freeman* was considered as binding. *Id.* at 450-51, 107 S.W.2d at 568. In a strong dissent by Chief Justice Cureton, it was stated that the trial judge surely must not have intended to render an "India-rubber decree" which would bind not only the land in dispute but all other land. Basically, the dissent urged adoption of the highly refined view of the individualized concept which plaintiffs urged in *Freeman, i.e.*, since a title suit and a boundary suit are different in object and purpose, they should be considered as two distinct causes of action. *Id.* at 466, 107 S.W.2d at 576-77.

A decade after *Freeman* a divided court handed down a second landmark case on the bar/merger principle of res judicata which was styled *Moore v. Snowball.*[74] These two cases would serve as the foundation for subsequent development of the doctrine by Texas courts.

In *Snowball* plaintiffs first brought a trespass to try title action, alleging that a judgment of foreclosure (resulting from non-payment of property taxes) and a subsequent sheriff's sale were void due to failure of required service upon all parties in that action. Judgment was rendered for defendants. Plaintiffs subsequently instituted a second suit in which they conceded that the judgment and sale were not void, but sought to set aside the sheriff's sale. Plaintiffs alleged that the irregularity of the sale and the inadequacy of the price were grounds for vacating the sale. Defendant filed a general denial and asserted that the prior judgment barred prosecution of this second suit concerning the same land. The majority opinion held that the second suit was *not* barred by res judicata.

The court was applying the *individualized* concept of cause of action. The majority opinion reasoned that in the first action plaintiffs sought to recover the land by asserting a legal claim for title of the property; the trial court properly denied recovery under that claim and rendered judgment for defendant. In the second action, the plaintiffs sought an altogether different remedy; they were now asserting an equitable action to set aside the sale, notwithstanding the prior determination that the judgment and sale were not void.

In applying the *individualized* concept, the court emphasized that the two actions were based upon different evidence, each sought a different form of relief, and different judgments were applicable to each suit. According to the majority's approach, res judicata should attach only when the matter urged in a second suit was actually comprehended within the issues tendered in the prior action. Thus, as plaintiffs' equitable relief was not available under the actual pleadings and proof in the first action, the first suit did not operate as a bar.

The court did acknowledge that abolition of the prior law/equity distinction and liberal joinder rules would have permitted plaintiff's joinder of both actions. In light of the established principle that a judgment is final not only as to matters actually determined but also as to "matters which might have been litigated," why then was the second action not barred? In responding to this problem, the court interpreted the principle as applying only to "matters which properly belong to a cause of action asserted in the pending suit;"[75] thus, the principle should not be interpreted as requiring joinder of other causes of action respecting the same property. According to the court, the latter interpretation would result in limiting the parties to a single suit on the same property, and such a notion manifested too broad a reading of the principle. Finally, the court did not consider it significant that plaintiffs were now asserting a cause of action which due to their own error was

74. 98 Tex. 16, 81 S.W. 5 (1904).
75. *Id.* at 24, 81 S.W. at 8.

not alleged in the first suit. Thus, plaintiffs' admitted misconception of their available remedy in the first action did not preclude their prosecuting a second suit with a newly discovered basis for recovery.

In his dissenting opinion, Judge Brown vigorously argued that only one cause of action existed; therefore, the first judgment should have barred any subsequent prosecution of this matter by plaintiffs. The dissent emphasized the liberal joinder available as a result of the merger of law and equity courts and favored the definition of cause of action advocated by Pomeroy and others.[76] Under the concept urged by the dissent, the majority opinion failed to distinguish between a cause of action and a remedy. In both actions, plaintiffs attacked defendants' alleged unlawful possession of the property; the object of both suits was to recover the land.

Judge Brown did not quarrel with the majority's finding that different evidence was required to support each of the actions; however, the majority's *same evidence* test seemed unpersuasive, for Judge Brown noted that different evidence was also necessary to support each material issue in any case. Thus, the majority's myopic interpretation was the result of their confusion between different *issues* and different *causes of action.* The dissenting opinion maintained that the sole question in both actions was title and right of possession, and thus plaintiffs should have urged every fact pertinent to that issue. If the plaintiffs framed their first action so as to preclude presentation of certain evidence supporting their right of recovery, it was their misfortune. Thus, while the majority was willing to let plaintiffs cure their initial oversight by bringing a second action, the dissenting view was to let plaintiffs suffer the misfortune of their shortsightedness. Finally, it was stated that the majority's interpretation would allow plaintiffs to bring an independent action for every ground upon which they might attack the judgment and sale.[77]

The dissenting opinion clearly rejected the majority's use of the *individualized* concept. While arguing in terms of Pomeroy's "primary right" definition, Judge Brown advocated a more *pragmatic* approach toward interpretation of the cause of action. The relationship of the two actions was such that they should have been considered one operative unit; further, both equity and policy considerations certainly weighed heavily in favor of requiring joinder of the two actions.

The court in *Freeman* easily applied the *individualized* concept in the situation of two suits involving the same land; although the two suits were allegedly distinct actions, the court rejected this fine distinction and determined that only one cause of action for title existed. In *Snowball* the court

76. J. POMEROY, *supra* note 60, §§ 346-47; *see* note 60 *supra.*

77. 98 Tex. at 41, 81 S.W. at 18. On numerous occasions, the court has emphasized the importance of diligence of the parties in asserting their claims. For example, in *Freeman* the court stated: "When a party passes by his opportunity, the law will not aid him." 87 Tex. at 139, 27 S.W. at 100. The court then quoted with approval a statement from an Ohio opinion: "By refusing to relieve parties against the consequence of their own neglect, [the law] seeks to make them vigilant and careful. On any other principle, there would be no end to an action, and there would be an end to all vigilance and care in its preparation and trial." *Id.*, quoting Ewing v. McNairy, 20 Ohio St. 315, 322 (1870).

was faced with two suits which concerned ownership of the same property, but the distinction between the legal and equitable actions was a sufficient basis for considering them as two causes of action. The *Snowball* opinion not only embraced the *individualized* concept, it also clearly rejected any broader definition of cause of action. While the minority viewpoint in *Snowball* forcefully articulated an adoption of a more *pragmatic* concept, the clear thrust of the majority, in tandem with the language of *Freeman*, was to establish that the *individualized* concept was the recognized manner by which the court would determine what constituted a single cause of action.

In 1963, the case of *Ogletree v. Crates*[78] required a supreme court interpretation of the bar principle of res judicata in a wholly different factual context. In *Ogletree* the issue before the court was proper custody of John Ogletree, Jr., son of John Ogletree and his former wife, Margie Crates. Ogletree and Mrs. Crates were married in 1953; the son was born in 1955. In 1956, the couple was divorced by an Alabama court, with custody of the son going to Mrs. Crates. The parties were remarried in 1956 and again divorced in 1957; the 1957 divorce judgment included an agreement for Mrs. Crates to have custody of John Ogletree, Jr., for limited periods, with general custody of the boy being in Ogletree.

After certain changes in Ogletree's circumstances in 1958, Mrs. Crates sought a modification of the 1957 divorce decree in the Alabama court; since the court found that the prior agreement and decree should not be disturbed, Mrs. Crates' petition was dismissed. Mrs. Crates later remarried, moved to Texas, and in 1960, filed suit in Houston, Texas, for change of custody based upon changed conditions. On July 15, 1960, the Houston court denied relief to Mrs. Crates. In 1961, she obtained custody of John Ogletree, Jr., for a limited time as provided by the 1957 judgment; upon her refusal to return the child to Ogletree, Ogletree instituted a habeas corpus proceeding.

Mrs. Crates asserted the right to sole custody on two grounds: (1) the 1957 Alabama judgment should be set aside as it was obtained by duress and fraud; (2) changed conditions were a basis for now awarding her sole custody. The court determined that since a final judgment in a custody proceeding is res judicata of the best interests of a child as to conditions then existing, and because Mrs. Crates had failed to show any change of conditions subsequent to the 1960 Houston court judgment, that judgment should bar Mrs. Crates' present claim.[79] Further, Mrs. Crates had sought to alter the 1957 Alabama judgment both in that court in 1958, and in Houston in 1960. However, since Mrs. Crates had knowledge of the facts surrounding the alleged fraud and duress when she brought the prior suits, her failure to assert the claims on those occasions precluded her from now urging them.

In discussing the bar principle of res judicata, the court reiterated principles from *Freeman* and *Snowball*. The court cited *Freeman* for its broad language that res judicata bars not only issues actually litigated, but also

78. 363 S.W.2d 431 (Tex. 1963).
79. This was her second ground of relief. *Id.* at 434.

issues connected with the cause of action which, with diligence, might have been asserted. *Snowball* was said to have established the limitation that res judicata would not bar a second suit which claimed a "technically different cause of action."[80]

The court recognized that such a "technical distinction" might exist between Mrs. Crates' suit to modify a final judgment and her suit to set aside the final judgment. However, such a distinction, resulting from the narrow application of the *individualized* concept in *Snowball*, was not persuasive to the court. In language more resembling the dissenting opinion in *Snowball*, the court determined that the "broad" cause of action and "relief sought" in both actions were identical. Further, public policy would favor the result arrived at by the court, because the best interests of the child are promoted by maintaining stability of the child's domicile and in avoiding subsequent custody litigation. Finally, the court reasoned that one custody judgment should bar those claims which the party could have urged, with diligence, as grounds for obtaining custody.[81]

The import of *Ogletree* lies in its recognition and rejection of the "technical" concept applied in *Snowball*. The court considered the *individualized* concept, but chose a *pragmatic* approach instead. A suit for modification of a final judgment and one for setting aside a final judgment could easily be categorized as one operative unit under the *pragmatic* concept; in addition, the court gave considerable weight to more abstract considerations such as the policy against relitigation in custody matters and diligence in asserting all causes of actions which could have been urged in such a suit.

The next interpretation of the cause of action to be discussed here came in *Abbott Laboratories v. Gravis*.[82] The plaintiff allegedly suffered partial paralysis and other disabilities as a result of various acts of negligence occurring in connection with an abdominal operation. In the first suit, plaintiff had asserted numerous allegations of Abbott's negligence in the manufacture of pentothal sodium, a drug used in the spinal anesthetic.[83] Summary judgment was granted for defendant Abbott.[84]

In the second action, plaintiff based her claim upon a products liability theory, asserting that the pentothal sodium used intravenously was unfit for use. Plaintiff claimed that the prior judgment, denying plaintiff's recovery on a negligence theory, should not operate as a bar to plaintiff's subsequent action based upon products liability. As an additional reason for allowing the second action, plaintiff contended that her prior claim based upon use of the drug in the spinal column was altogether different from the claim arising from the drug being used intravenously. The court rejected plaintiff's attempt to apply the *Snowball* type of *individualized* concept. In looking at the two actions, the court observed that they constituted one operative

80. *Id.* at 435-36.
81. *Id.* at 436.
82. 470 S.W.2d 639 (Tex. 1971).
83. In the first action, plaintiff also sued the hospital, the doctors, and the anesthetist, as well as Abbott. *Id.* at 640.
84. *Id.*

unit; both suits involved a tort resulting from use of the same drug, for the same operation, and for the same purpose. Further, the court refused to read plaintiff's pleading so narrowly as to consider the spinal column and intravenous allegations as wholly different, and both matters certainly could have been determined in the first suit.[85]

In applying a *pragmatic* concept of cause of action, the court also pronounced important public policy considerations. Res judicata was designed to expedite justice, terminate litigation and retain sanctity of judgments. The court cited both *Freeman* and *Ogletree* for the proposition that all matters in reference to the same subject matter, or all issues connected with a cause of action, must be asserted in a single action. The *Gravis* opinion is consistent with both the language and thrust of *Ogletree*. It is also evident that the court rejected the application of the *individualized* concept and adopted the *pragmatic* approach.

In its recent opinion in *Griffin v. Holiday Inns of America*[86] the Texas Supreme Court clearly articulated the practical problems in determining what constitutes a single cause of action. In *Griffin* plaintiff first sued defendant Holiday Inn for recovery of an amount due under a paving contract. Defendant claimed nonperformance by plaintiff and counterclaimed for damages resulting from plaintiff's breach of contract. The trial court ordered that both plaintiff and defendant take nothing and the court of civil appeals affirmed.[87] Plaintiff then brought an action against defendant for recovery under *quantum meruit*, for value of labor and services furnished to defendant. While both the trial court and court of civil appeals[88] determined that the prior judgment operated as a bar on the second action, the supreme court held that the actions for contract and *quantum meruit* constituted two distinct causes of action; therefore, res judicata would normally not preclude prosecution of the second suit. However, the court affirmed the lower courts, basing its judgment on rule 97 of the Texas Rules of Civil Procedure. The rationale was that since the defendant had filed a counterclaim in the first suit and plaintiff's *quantum meruit* claim arose out of the same transaction that was the subject matter of defendant's counterclaim, plaintiff's *quantum meruit* action was a compulsory counterclaim to defendant's counterclaim and was required to be brought when the counterclaim was filed under the provisions of rule 97.[89]

85. *Id.* at 642-43.
86. 496 S.W.2d 535 (Tex. 1973).
87. 452 S.W.2d 517 (Tex. Civ. App.—Austin 1970).
88. 480 S.W.2d 506 (Tex. Civ. App.—Austin 1972).
89. TEX. R. CIV. P. 97:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has con-

In rejecting the lower court determination that the contract action was a bar to the subsequent *quantum meruit* suit, the court was able to recite considerable authority establishing that two consecutive actions, each relating to one of these particular theories, were permissible and not to be prohibited by the doctrine of res judicata.[90] The court also analyzed the basis for the lower court's misconception of past interpretation of the bar principle in res judicata. From a literal reading of the language set forth in *Freeman* and reiterated in *Gravis*, the lower court apparently determined that since the *quantum meruit* action was a "matter which might have been litigated" by plaintiff, his failure to assert the claim barred a subsequent *quantum meruit* suit.

In effect, the lower court's liberal translation of *Freeman* and *Gravis* resulted in an application of the *broad procedural duty* concept, *i.e.*, all claims and causes of action arising from the same transaction which are amenable to joinder must be asserted in one action. The supreme court noted that while such compulsory joinder does apply to counterclaims under rule 97, Texas courts have not gone so far as to apply this principle[91] to a plaintiff's several claims arising from the same transaction. *Freeman* spoke in terms of a party failing to assert matters in reference to the same subject matter. The court stated that the same subject matter refers to the same claim or controversy in dispute in a prior action; thus while one is required to assert every ground of recovery or defense relating to a cause of action, he is not required to assert all claims and causes of action arising from the same transaction.

Most importantly, the court acknowledged the difficulty in determining whether a subsequent suit deals with the same cause of action urged in a prior suit. Since the court depended upon the established contract/*quantum meruit* rule[92] regarding consecutive suits, it was not required to grapple with the problem of defining the cause of action. However, a footnote reveals that at least two members of the court favored a more pragmatic approach.[93] They advocated a concept similar to that proposed by Schopflocher:[94] courts should use an *individualized* concept in first determining what constitutes

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sented in writing that said judgment shall operate as a bar.

The thrust of the dissenting opinion was directed at the majority's affirmance on this point. The dissenting judge argued that neither party was aware of the significance of rule 97 at the trial court; further, the point was never urged, argued, or briefed by either party. For this reason, the dissenting opinion asserted that the court should not affirm on such a point but should reverse without mention of rule 97. 496 S.W.2d at 540.

90. In two older cases, Whitney v. Parish of Vernon, 154 S.W. 264 (Tex. Civ. App.—Galveston 1913), *error ref.*, and Henrietta Nat'l Bank v. Barrett, 25 S.W. 456 (Tex. Civ. App. 1894), *error ref.*, the court adopted an *individualized* concept of cause of action in a contract/*quantum meruit* context. In both cases, plaintiffs were denied recovery on a contract action; plaintiff's subsequent action for recovery under *quantum meruit* against the same defendant was held not barred by res judicata. The court reasoned in each instance that the contract/*quantum meruit* actions were each based upon different rules of substantive law, and each required different evidence. *See also* RESTATEMENT § 65, comment *j*, at 279-80.

91. *I.e.*, the *broad procedural duty* concept.

92. *See* note 90 *supra*.

93. 496 S.W.2d at 538 n.1.

94. *See* Schopflocher 363-64, for more complete discussion.

a single cause of action. If the causes of action are the same, the subsequent action is barred. If the causes are different, the court should consider other factors in determining whether a procedural penalty (barring the second suit) should be imposed. Thus, the cause of action dilemma is handled not by ambiguous definition, but by procedural duty.[95]

On the heels of the *Griffin* decision the supreme court handed down *Westinghouse Credit Corp. v. Kownslar.*[96] Defendant, Mrs. Kownslar, guaranteed payment on several promissory notes executed by obligor to Westinghouse. By March of 1967 all nine notes were in default; Westinghouse sued defendant on four of the notes. The trial court rendered judgment for Westinghouse; the court of civil appeals affirmed.[97]

In January 1971 Westinghouse again filed suit against defendant, now seeking the amount due on the five remaining notes. Defendant claimed that the second suit was barred by res judicata. According to defendant, Westinghouse's action was based upon the guaranty contract which she executed; since a single contract existed, Westinghouse should have asserted all of its claims in the first suit. On the other hand, Westinghouse reasoned that each promissory note constituted a separate cause of action; therefore, individual actions should be permitted. Further, it was well settled that Westinghouse could bring separate suits against the original obligor; why then should defendant enjoy an advantage not available to the obligor?

As stated by the court, the only issue was the applicability of the doctrine of merger. If Westinghouse's cause of action "merged" into the final judgment, Westinghouse could not later assert claims which could have been litigated in the prior suit. Having discovered no precedent upon which to base its determination, the court attempted simply to balance the equities of the situation. The result was application of the *pragmatic* concept, with primary emphasis upon exigent policy considerations.[98]

The court acknowledged two important purposes underlying the doctrine of merger; by prohibiting a second suit, merger acts to prevent harassment of defendants and discourages unnecessary waste of the court's time. In the court's view, the two suits were not designed to vex the defendant, and Westinghouse might well have had a business reason for bringing two actions. Further, defendant may have enjoyed some benefit from the Westinghouse's delay in bringing the second action.[99] Finally, the court determined that in regard to the form of the transaction and prosecution of two suits in this situation, "the risk of opportunity for abuse is so far offset by the unlikelihood of its occurrence as not to warrant imposition of the severe rule of merger."[100] The court did not attempt to resolve the issue by defini-

95. In effect, this approach is a hybrid of the *individualized* concept and the *broad procedural duty* concept.
96. 496 S.W.2d 531 (Tex. 1973).
97. Blount v. Westinghouse Credit Corp., 432 S.W.2d 549 (Tex. Civ. App.—Dallas 1968).
98. The court seemed to be using the *ad hoc policy determination* approach, described in note 60 *supra*.
99. 496 S.W.2d at 532.
100. *Id.*

tion or analysis of the causes of action involved. Instead, the court adopted a policy oriented approach, with the decision based in part upon a determination of how the business community might view such a problem.[101]

## VI. CONCLUSION

In light of recent developments, where do Texas courts now stand on the concept of cause of action in the res judicata context? It is evident that there has been a progression, in both a temporal and philosophical sense, from the *Freeman* and *Snowball* opinions at the turn of the century to the most recent *Griffin* and *Westinghouse* cases. Without question, the recent opinions manifest a more practical approach to the problem of determining what constitutes a cause of action. The *Ogletree* and *Gravis* cases reject the narrower *individualized* concept approach of earlier cases and embrace application of the more progressive (albeit traditional) *pragmatic* concept; additionally, the two most recent opinions, *Griffin* and *Westinghouse*, are indicative of a trend toward even more flexible theories. In *Griffin*, two judges indicated a desire to move toward the more pragmatic approach which would define the cause of action according to the *individualized* concept, but preclude subsequent litigation on the basis of practical application of a *procedural* penalty.[102] In the *Westinghouse* opinion, the court adopted an *ad hoc policy determination* approach,[103] with primary emphasis upon the equities, policy considerations and practical effects involved in its determination.

It is important to recognize that the facts in a particular case, applicable legal precedent, or a rule of procedure may control the outcome of a case, irrespective of the theories and policy considerations discussed herein. For example, in *Griffin*[104] an established rule on contract/*quantum meruit* actions was determinative of the "cause of action" issue, and the compulsory counterclaim provision of rule 97[105] became the controlling principle in the case. However, in light of the potential impact of res judicata on cases in all areas of the law, careful and mature consideration should be given to the expanding concepts that will influence and indeed may rule res judicata in the future. There is good reason for the joinder of related claims in one action; this approach should override the temptation to save for future litigation those claims which might qualify, on technical grounds, as *individualized* causes of action. This is but to say that it behooves the lawyer of today not to fragment a cause of action or to fail to assert matters which might be litigated in the current suit in expectation that he will have something left for a later, and perhaps more successful, day in court.

101. *Id.* at 533.
102. *See* Schopflocher 363-64.
103. *See* note 60 *supra.*
104. *See* note 89 *supra.*
105. TEX. R. CIV. P. 97; *see* note 89 *supra.*